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Legal Researcher
DOUG STERNBERG

Montana Legislative Services Division

Legal Services Office

PO BOX 201706
Helena, Montana 59620-1706
(406) 444-3064
FAX (406) 444-3036

Attorneys
BARTLEY J. CAMPBELL
LEE HEIMAN
VALENCIA LANE
JOHN MACMASTER
EDDY MCCLURE
DAVID S. NISS

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TO: Eminent Domain Subcommittee of the Environmental Quality Council

FROM: Greg Petesch *GP*

RE: Condemnation of Private Roads

The subcommittee has asked for an analysis of section 70-30-102(6), MCA, providing that the power of eminent domain may be exercised for private roads leading from highways to residences or farms. The subcommittee has specifically asked whether the property to which access is sought is required to have an existing residence or farm before eminent domain may be used to acquire access. I conclude that the property must have an existing residence or farm in place in order to allow the property owner to exercise the power of eminent domain to condemn a private road to the property.

In Komposh v. Powers, 75 Mont. 493, 244 P. 298 (1926), the Montana Supreme Court determined that the courts must determine whether or not the use for which property is sought to be taken is a public use within the meaning of Montana law. The court also determined that in determining if a "private road" was in fact a "public use", the court would look to the right to use the road and if, in fact, the road could be used by the public, the statute was not unconstitutional as a violation of the 14th Amendment to the United States Constitution. The court also noted that the statute was limited to private roads leading from highways to farms and the statute was not in fact authorizing "private" roads, but "public" roads that lead from a public highway and that would be open to any member of the public that chose to travel the road, although few would choose to travel the road.

In Groundwater v. Wright, 180 Mont. 27, 588 P.2d 1003 (1979), Groundwater wanted to condemn an access route from the county road to his property. The evidence showed that the property was not currently being used as a farm or residence. Groundwater indicated that when he retired he intended to build a home on the property and raise cattle. The court determined that because the property was not in current use as a farm or residence, the requisite necessity for condemning a road across another's land was absent.

The most recent decision construing section 70-30-102(6), MCA, is Richter v. Rose, 1998 MT 165, 289 Mont. 379, 962 P.2d 583 (1998). In Richter, the District Court entered a preliminary condemnation order allowing the Richters to condemn a private road across Rose's property, based upon the conclusion that the property was a farm. The Richters' property consisted of meadows and timberland. The Richters had hired a forester and intended to extract merchantable timber from the property. On appeal, the Montana Supreme Court reversed the District Court. The Supreme Court determined that all of the definitions of "farm" in the Montana Code Annotated clearly express the intent that the definition is limited to specific areas of the MCA. Therefore, the provisions of section 1-2-107, MCA, did not apply. Section 1-2-107, MCA, provides that when a word is defined in any part of the MCA, the definition applies wherever the word appears unless a contrary intention plainly appears. The court therefore resorted to the definition of "farm" in the *American Heritage Dictionary* (3d ed. 1992). That definition provided that a farm was a tract of land cultivated for agricultural production. Cultivation was defined as land that was plowed or fertilized for raising crops. Because the Richters had not prepared, fertilized, or tilled the soil on the property, the property was not a "farm". Because the property was not a farm, the Richters could not exercise the right of eminent domain to condemn a road across Rose's property.

Based upon these decisions, a farm or residence must exist on property before the power of eminent domain may be exercised to condemn a private road to the property.

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